STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

ROBERT G. ZEICHMAN, Trustee of the Robert G. Zeichman Trust U/A/D 4/31/81, as amended; and ROBERT G. ZEICHMAN, Co-Trustee of the Mary Ann Zeichman Trust U/A/D 2/1/91, as amended,

Plaintiffs,

vs.

ZEICHMAN MANUFACTURING, INC., a/k/a G.A. Richards Wood Operations,

Defendant.
_____/

Case No. 12-11821-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND DENYING, WITHOUT PREJUDICE, DEFENDANT'S MOTION FOR SANCTIONS

Every college graduate knows about the age-old battle between landlords and students over security deposits at the end of each school year. This case presents an industrial version of that form of dispute. After the Zeichman family sold their company, Zeichman Manufacturing, Inc. ("ZMI"), to John Boll, ZMI remained in its traditional location at 5985 Clay Avenue, S.W., in Grand Rapids under a long-term lease with the Zeichman family. But when that lease ended and ZMI vacated the premises, ZMI purportedly took permanent fixtures and left the building in a state of disrepair. That prompted the plaintiffs – Robert G. Zeichman acting in the capacities of trustee of two family trusts – to file this suit alleging breach of contract and four other claims arising from ZMI's departure from the leased space. Because genuine issues of material fact abound, the Court must deny ZMI's motion for summary disposition except as to Count Two and deny ZMI's request for sanctions.

I. Factual Background

"'A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.'" Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). In evaluating such a motion, the Court "considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." Id. Accordingly, the Court must set forth the facts underlying this dispute in a manner favorable to the plaintiffs.

On September 28, 2001, John Boll entered into a stock purchase agreement with the Mary Ann Zeichman Trust that provided him with a controlling interest in ZMI. See Defendant's Motion for Summary Disposition, Exhibit 1. In addition, Mr. Boll – acting on behalf of ZMI – assumed an existing lease between the Robert G. Zeichman Trust and ZMI, thereby enabling ZMI to maintain its operations at 5985 Clay Avenue, S.W., in Grand Rapids. See id., Exhibit 2. Indeed, the "Lease Agreement" signed by Mr. Boll and the trusts extended the term of the lease to September 30, 2011. See id., Exhibit 2 (lease amendment appended to existing "Carefree Lease of Industrial Facility"). Consequently, ZMI continued to operate in the building at 5985 Clay Avenue for ten years after Mr. Boll took control of the company in 2001.

On September 30, 2011, Defendant ZMI vacated the premises, taking many items essential to its business. In the wake of ZMI's departure, Robert Zeichman inspected the premises and found the building in an unsatisfactory condition. Despite his dissatisfaction with the state of the building, Mr. Zeichman listed the property for sale and ultimately accepted an offer of $850,000. Despite the sale of the property, Mr. Zeichman has pursued this case to recover for the deprivation of items that ZMI took from the premises as well as the purported loss in value caused by ZMI's failure to leave the premises in good order upon its departure.

For its part, Defendant ZMI contends that it left the building in good condition and took only those items that it acquired through the stock purchase in 2001. On December 6, 2013, ZMI filed a motion for summary disposition under MCR 2.116(C)(10), asserting that the plaintiffs' claims are so far-fetched that the Court should impose sanctions upon them for pursuing frivolous litigation. After considering extensive briefing and oral arguments from the parties, however, the Court finds that numerous genuine issues of material fact preclude the entry of summary disposition for either side on almost all of the claims. In addition, the Court concludes that, at this point, no basis exists for the imposition of sanctions under any Michigan Court Rule cited by the defendant.

II. The Request for Summary Disposition

According to MCR 2.116(C)(10), the Court must award summary disposition if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." See also Maiden v Rozwood, 461 Mich 109, 120 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v General Motors Corp, 469 Mich 177, 183 (2003). The Court must consider each of the plaintiffs' five claims individually to determine whether Defendant ZMI is entitled to summary disposition on each cause of action.

A. Count One – Breach of Contract.

The relationship between the plaintiffs and Defendant ZMI was governed by a ten-year lease styled as a "Carefree Lease of Industrial Facility." In Count One of their complaint, the plaintiffs claim that, although ZMI satisfied its financial obligations under that agreement, ZMI nonetheless

breached the lease because ZMI "damaged several substantial portions of the building, and forcibly removed improvements to the leasehold and equipment belonging to the Plaintiff[s]" when ZMI left the premises at the end of September 2011. See Complaint, ¶ 6. The lease contains the following language specifically obligating ZMI to maintain the condition of the premises:

> Tenant shall, at its expense, in every way place, keep and maintain the Premises, and each component of the Premises, and all of tenant's property upon the Premises, in a good and clean operating condition. Tenant's obligations shall include, but not necessarily be limited to, roadway, parking, landscaping, exterior and structural maintenance, reconstruction and repairs (including all necessary replacements), the replacement of broken glass and the repair and maintenance (including all necessary replacements) of the interior portions and components of the Premises, such as the walls, ceiling, heating, air conditioning, electrical, plumbing, dust collecting and sprinkler systems, any building security system and other interior components.

See Defendant's Motion for Summary Disposition, Exhibit 2 (Carefree Lease of Industrial Facility, § 7). Beyond that, the lease includes the following provision forbidding ZMI to remove any changes or improvements from the building:

> . . . Unless otherwise directed by Landlord in writing, no alterations, improvements, additions or physical changes made by Tenant shall be removed by Tenant from the Premises at the termination of this Lease.

See id., Exhibit 2 (Carefree Lease of Industrial Facility, § 9(a)). Finally, the lease contains a section obligating ZMI to leave the building in good order at the end of its tenancy:

> Upon the expiration or termination of this Lease, . . . Tenant shall Restore the Premises to the same condition in which they were in at the beginning of the Term (except for approved alterations, additions or improvements made pursuant to Section 9 above), remove all of its personal property (including all signs, symbols and trademarks pertaining to its business) from the Premises and repair any damage to the Premises caused by such removal[.]

See id., Exhibit 2 (Carefree Lease of Industrial Facility, § 17(a)). Because the plaintiffs contend that ZMI violated those obligations, the plaintiffs insist that ZMI breached the lease agreement.

Defendant ZMI argues that the plaintiffs' breach-of-contract claim cannot survive a motion for summary disposition under MCR 2.116(C)(10) because the plaintiffs have presented no evidence to demonstrate that ZMI damaged the premises. To be sure, Michigan law requires a plaintiff in a breach-of-contract action to establish "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." See Miller-Davis Co v Ahrens Construction, Inc, 296 Mich App 56, 71 (2012). Here, the plaintiffs have furnished a lengthy list of items that were either left in disrepair or removed from the premises when ZMI departed at the end of September 2011. See Plaintiff's Response in Opposition to Defendant's Motion for Summary Disposition, Exhibit 7. In addition, the plaintiffs have offered supporting documents for those elements of damage. See id. Moreover, Robert Zeichman testified at his deposition that ZMI improperly took fixtures such as an electrical buss, cables, two steel hand rails, and a slop sink when it left.[1] See id., Exhibit 15 (Deposition of Robert Zeichman at 35-37, 47). In sum, the plaintiffs have presented sufficient evidence to create genuine issues of material fact with respect to their claim for breach of contract. Accordingly, a jury must resolve the dispute framed by the breach-of-contract claim in Count One of the complaint.[2]

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[1] Defendant ZMI claims that it had a legal right to remove those items based upon the stock purchase agreement executed on September 28, 2001, but that two-page agreement does not mention specific items of property that changed hands. See Defendant's Motion for Summary Disposition, Exhibit 1. Although John Boll testified at his deposition about the existence of a list, see Plaintiff's Response in Opposition to Defendant's Motion for Summary Disposition, Exhibit 16 (Deposition of John Boll at 58), he acknowledged that he cannot produce such a document. Needless to say, the Court cannot rely upon evidence that has not been produced by either side.

[2] To the extent that the plaintiffs seek summary disposition pursuant to MCR 2.116(I)(2) on their claim for breach of contract, the Court must reject that request. Defendant ZMI has presented evidence that the damage to the leased building was attributable to simple wear and tear that should be expected during the life of a long-term lease. See Defendant's Motion for Summary Disposition, Exhibit 9 (Deposition of Jeffrey Genzink at 64).

B. Counts Two – Specific Performance.

The Court has detected a significant divergence between the specific-performance claim that the plaintiffs have pleaded in Count Two of their complaint and the specific-performance argument that they have advanced in opposing summary disposition. That is, Count Two refers to Defendant ZMI's "ongoing refusal to perform these repairs" to the leased premises, see Complaint, ¶ 29, while the plaintiffs' response brief demands an order directing ZMI "to file a UCC financing statement to perfect" a landlord lien. See Plaintiff's Response in Opposition to Defendant's Motion for Summary Disposition at 20. The plaintiffs seem to acknowledge that the remedies of specific performance and money damages for breach of contract are mutually exclusive. See, e.g., Rowry v Univ of Michigan, 441 Mich 1, 9 (1992) ("Rather than seeking money damages for breach of contract, the plaintiff in this case seeks specific performance . . . ."); Forest City Enterprises, Inc v Leemon Oil Co, 228 Mich App 57, 79-80 (1998) ("equitable relief" refers to "'the case of one seeking an injunction or specific performance instead of money damages'"). Beyond that, the plaintiffs recognize that the remedy of specific performance no longer affords meaningful relief because the plaintiffs "no longer own[] the property." See Plaintiff's Response in Opposition to Defendant's Motion for Summary Disposition at 20. Thus, the plaintiffs request in their response brief "that Defendant be order[ed] to perform all its obligations under the lease, which includes reimbursement for all damage Defendant caused to the property." Id.

To the extent that Count Two has morphed into a second version of a claim for damages for breach of contract, that claim is purely redundant in light of Count One. To the extent that Count Two seeks the equitable remedy of specific performance in lieu of money damages, the claim seems to be moot in light of the plaintiffs' sale of the property. Thus, the only potentially viable claim for

specific performance arises from an unfulfilled obligation to execute a UCC-1 financing statement. Specifically, section 14 of the lease agreement required that, "[t]o perfect Landlord's lien, Tenant shall at the time it executes this Lease also execute a UCC-1 financing statement for filing with the appropriate agencies." See Defendant's Motion for Summary Disposition, Exhibit 2 (Carefree Lease of Industrial Facility, § 14). Unfortunately for the plaintiffs, that lease agreement was executed on November 1, 2000, by Robert Zeichman on behalf of ZMI, see id., who therefore bore the obligation to comply with the UCC-1 filing requirement at the time he executed the lease agreement on behalf of ZMI. The fact that John Boll subsequently assumed the lease agreement in 2001 does not absolve Robert Zeichman of the blame for the failure to file a UCC-1 financing statement on behalf of ZMI on November 1, 2000. In sum, the Court concludes that the claim for specific performance in Count Two – no matter how the plaintiffs may now choose to frame it – cannot survive Defendant ZMI's motion for summary disposition under MCR 2.116(C)(10).[3]

C. Count Three – Foreclosure of Landlord's Lien.

The most puzzling claim advanced by the plaintiffs appears as Count Three of the complaint and bears the title: Foreclosure of Landlord's Lien. "A landlord's lien is the right of a landlord to levy upon the goods of a tenant in satisfaction of unpaid rents or property damage." See Shurlow v Bonthuis, 456 Mich 730, 734 (1998). Although landlord's liens generally fall outside the coverage of article 9 of the Uniform Commercial Code, see id. at 736, our Supreme Court has concluded that

[3] Ordinarily, when the Court grants summary disposition under MCR 2.116(C)(10), the Court must afford the plaintiff leave to amend the complaint pursuant to MCR 2.116(I)(5). Here, however, the Court need not extend that courtesy to the plaintiffs because any amendment of the plaintiffs' claim for specific performance in Count Two would be futile. See Ormsby v Capital Welding, Inc, 471 Mich 45, 53 (2004). No matter how the plaintiffs may choose to dress up that claim, it amounts to nothing more than "nonsense upon stilts," to borrow a phrase from Jeremy Bentham.

every "consensual contractual lien" – including such a landlord's lien – comes within the coverage of article 9 of the UCC. See id. at 737. Therefore, the plaintiffs may be able to assert a landlord's lien "in the personal property of [Defendant ZMI] that they had not perfected." See id. at 738. At this juncture, the Court cannot determine whether ZMI should be directed to take any action aimed at perfecting a landlord's lien in favor of the plaintiffs. Instead, the Court shall allow the trial on the legal claims to run its course, and thereafter take up the request for equitable relief concerning the landlord's lien. Accordingly, ZMI's motion for summary disposition on Count Three pursuant to MCR 2.116(C)(10) must be denied.

D. Count Four – Common Law Conversion.

Count Four pleads a common-law-conversion claim that hinges upon the plaintiffs' assertion of ownership of items such as the electrical buss, cables, steel hand rails, and a sink that Defendant ZMI took with it when it vacated the leased premises. Common law conversion requires a "'distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" Dep't of Agriculture v Appletree Marketing, LLC, 485 Mich 1, 13-14 (2010). "Though the tort is an intentional tort because the converter's acts are willful, one can also commit this tort while being unaware of the plaintiff's property interest." Lawsuit Financial, LLC v Curry, 261 Mich App 579, 591 (2004). But ownership is the *sine qua non* of a common-law-conversion claim because "'a person can[not] "convert" his own property[.]'" Foremost Ins Co v Allstate Ins Co, 439 Mich 378, 391 (1992). Consequently, neither side is entitled to summary disposition under MCR 2.116(C)(10) on the common-law-conversion claim unless no genuine issue of material fact remains with respect to ownership of the various items that ZMI removed from the premises.

As foreshadowed by the Court's discussion of the claim for breach of contract in Count One, neither side can claim a right to summary disposition on the common-law-conversion claim in Count Four because neither side has presented an unshakable claim to ownership of any of the major items at issue. At the threshold, genuine issues of material fact exist as to whether the items constituted fixtures that were part of the leased premises or, instead, mere items of personal property that could readily and permissibly be removed upon Defendant ZMI's departure. Beyond that, ZMI contends that the stock purchase agreement transferred all of the items in dispute, but nothing in the language of that agreement supports ZMI's contention. See Defendant's Motion for Summary Disposition, Exhibit 1. Therefore, a jury must decide whether ZMI engaged in common law conversion when it removed items like the electrical buss, cables, steel hand rails, and a sink upon its departure from the leased premises.

E. Count Five – Statutory Conversion.

Count Five alleges statutory conversion, which consists of "stealing or embezzling property or converting property to [one]'s own use."[4] See MCL 600.2919a(1)(a). Statutory conversion, just like common law conversion, requires proof of "'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" Aroma Wines and Equipment, Inc v Columbia Distribution Services, Inc, 303 Mich App 441, 447 (2013). Beyond that, statutory conversion obligates the plaintiff to prove "that the conversion was to the defendant's 'own

[4] Statutory conversion can also involve "buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted." See MCL 600.2919a(1)(b). Because that theory is ill-suited to the facts of this case, the Court presumes that the plaintiffs have chosen to proceed on the theory of statutory conversion prescribed by MCL 600.2919a(1)(a).

use' as required by MCL 600.2919a(1)(a)." See id. In this context, the "term 'use' requires only that a person 'employ [the converted item] for some purpose,'" id. at 448, as opposed to merely giving it away or abandoning it. Finally, the plaintiff must have an ownership interest in the item superior to that of the defendant. See Foremost Ins, 439 Mich at 391.

As the Court explained in denying Defendant ZMI's request for summary disposition as to Count Four, both sides have presented sufficient evidence to create a genuine issue of material fact with respect to ownership of the allegedly converted items like the electrical buss, cables, steel hand rails, and the sink . By all accounts, ZMI took those items when it vacated the premises. So the only remaining question unique to the statutory-conversion claim concerns the "use" to which ZMI put the items. John Boll testified at his deposition that ZMI took the electrical buss and all of the related items "[b]ecause we own them." See Plaintiff's Response in Opposition to Defendant's Motion for Summary Disposition, Exhibit 16 (Deposition of John Boll at 48). The implication of that testimony is that ZMI took the electrical buss and the related items for its "own use," as contemplated by MCL 600.2919a(1)(a). See Aroma Wines, 303 Mich App at 447-448. Accordingly, the Court must deny ZMI's request for summary disposition under MCR 2.116(C)(10) on the claim in Count Five for statutory conversion.

III. The Request for Sanctions

In an apparent attempt to add throw-weight to its motion for summary disposition, Defendant ZMI has demanded that the Court impose sanctions upon the plaintiffs "in the form of fees incurred in discovery and motion practice, pursuant to MCR 2.114(D), (E) and (F) and MCR 2.625(A)(2), for having to investigate, disprove and discredit damages claims not well grounded in law or fact,

and which Plaintiff improperly asserted and maintained without making reasonable inquiry[.]" See Defendant's Brief in Support of Motion for Summary Disposition at 29. Of course, a motion for the entry of summary disposition under MCR 2.116(C)(10) merely involves an inquiry into the matter of liability, as opposed to damages. Consequently, the Court's summary-disposition analysis has no bearing upon ZMI's request for sanctions related to the plaintiffs' theories of damages. To be sure, the plaintiffs' complaint includes a suggestion of one theory of damages that does not seem grounded in economic reality. See Complaint, ¶ 17 (alleging that ZMI's breaches of lease agreement resulted in "significant diminution of value of the property" and sale "at a loss of over $975,000"). But the plaintiffs long ago disclaimed that measure of damages, choosing instead to pursue a theory based upon the costs of repair to the premises and replacement of the items taken by ZMI when it left. In addition, the Court has not yet heard testimony from either side with respect to damages, so a ruling on sanctions for the plaintiffs' purportedly frivolous theories of damages plainly would be premature at this juncture. Accordingly, the Court shall deny, without prejudice, ZMI's request for sanctions. But in doing so, the Court shall hold the plaintiffs to their assurance that diminution in value based upon the sale price of the premises will not be presented as a theory of damages at trial.

IV. Conclusion

For all of the reasons set forth in this opinion, the Court shall deny Defendant ZMI's motion for summary disposition under MCR 2.116(C)(10) on all counts in the complaint except for Count Two, which presents a claim for specific performance. The claims for breach of contract in Count One, common law conversion in Count Four, and statutory conversion in Count Five must be given to a jury for resolution. Indeed, even the plaintiffs' request for treble damages on the claim in Count

Five for statutory conversion must be resolved by the jury. See Aroma Wines, 303 Mich App at 449. After the jury has rendered its verdicts, the Court shall take up the landlord's lien claim set forth in Count Three of the complaint, the plaintiffs' request for attorney fees predicated upon the statutory-conversion claim in Count Five, and any renewed request for sanctions presented by ZMI.

IT IS SO ORDERED.

Dated: March 19, 2014

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge